

RESOLUTION 09-03-2014 (as amended)

DIGEST

Health and Safety: Whistleblower Protections

Amends Health and Safety Code section 1278.5 to extend whistleblower protection to certain licensed facilities and to clarify that recoverable costs include attorney's and expert witness fees.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

Similar to Resolution 08-09-2012, which was disapproved.

Reasons:

This resolution amends Health and Safety Code section 1278.5 to extend whistleblower protection to certain licensed facilities and to clarify that recoverable costs include attorney's and expert witness fees. This resolution should be disapproved because whistleblower protections for healthcare workers at those facilities are already provided in the legislative provisions governing those facilities.

This resolution amends Health and Safety Code section 1278.5 to add whistleblower protections to health care workers at licensed intermediate facilities, intermediate care facilities for the developmentally disabled, congregate living health facilities, and pediatric day health and respite care facilities. It also adds new subsection (g)(1) to clarify that the "legal costs" available to a prevailing whistleblower include reasonable attorney's fees and expert witness fees.

There is a separate legislative scheme governing the facilities added in this resolution, the "Long-Term Care, Health, Safety, and Security Act of 1973, Health and Safety Code section 1417 et seq. Health and Safety Code section 1418 provides a more complete definition of the facilities affected by this resolution. Workers at these facilities receive anti-retaliation protections under Health and Safety Code section 1432, but are not granted rights of reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, or the legal costs associated with pursuing the case, or to other remedies provided under Health and Safety Code section 1278.5. If these protections are to be added, the change should be made in section 1432.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Health and Safety Code section 1278.5 to read as follows:

§ 1278.5

- 1 (a) The Legislature finds and declares that it is the public policy of the State of California
- 2 to encourage patients, nurses, members of the medical staff, and other health care workers to
- 3 notify government entities of suspected unsafe patient care and conditions. The Legislature
- 4 encourages this reporting in order to protect patients and in order to assist those accreditation and
- 5 government entities charged with ensuring that health care is safe.
- 6 The Legislature finds and declares that whistleblower protections apply primarily to issues
- 7 relating to the care, services, and conditions of a facility and are not intended to conflict with
- 8 existing provisions in state and federal law relating to employee and employer relations.
- 9 (b) (1) No health facility shall discriminate or retaliate, in any manner, against any

10 patient, employee, member of the medical staff, or any other health care worker of the health
11 facility because that person has done either of the following:

12 (A) Presented a grievance, complaint, or report to the facility, to an entity or agency
13 responsible for accrediting or evaluating the facility, or the medical staff of the facility, or to any
14 other governmental entity.

15 (B) Has initiated, participated, or cooperated in an investigation or administrative
16 proceeding related to, the quality of care, services, or conditions at the facility that is carried out
17 by an entity or agency responsible for accrediting or evaluating the facility or its medical staff, or
18 governmental entity.

19 (2) No entity that owns or operates a health facility, or which owns or operates any other
20 health facility, shall discriminate or retaliate against any person because that person has taken
21 any actions pursuant to this subdivision.

22 (3) A violation of this section shall be subject to a civil penalty of not more than twenty-
23 five thousand dollars (\$25,000). The civil penalty shall be assessed and recovered through the
24 same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-
25 term health care facilities.

26 (c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a
27 grievance or complaint has been submitted, directly or indirectly, to a governmental entity or
28 received by a health facility administrator within 180 days of the filing of the grievance or
29 complaint, shall raise a rebuttable presumption that the action was taken by the health facility in
30 retaliation for the filing of the grievance or complaint.

31 (d) (1) There shall be a rebuttable presumption that discriminatory action was taken by
32 the health facility, or by the entity that owns or operates that health facility, or that owns or
33 operates any other health facility, in retaliation against an employee, member of the medical
34 staff, or any other health care worker of the facility, if responsible staff at the facility or the entity
35 that owns or operates the facility had knowledge of the actions, participation, or cooperation of
36 the person responsible for any acts described in paragraph (1) of subdivision (b), and the
37 discriminatory action occurs within 120 days of the filing of the grievance or complaint by the
38 employee, member of the medical staff or any other health care worker of the facility.

39 (2) For purposes of this section, discriminatory treatment of an employee, member of the
40 medical staff, or any other health care worker includes, but is not limited to, discharge,
41 demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of a
42 contract, employment, or privileges of the employee, member of the medical staff, or any other
43 health care worker of the health care facility, or the threat of any of these actions.

44 (e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the
45 burden of producing evidence as provided in Section 603 of the Evidence Code.

46 (f) Any person who willfully violates this section is guilty of a misdemeanor punishable
47 by a fine of not more than twenty thousand dollars (\$20,000).

48 (g) An employee who has been discriminated against in employment pursuant to this
49 section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused
50 by the acts of the employer, and the legal costs associated with pursuing the case, or to any
51 remedy deemed warranted by the court pursuant to this chapter or any other applicable provision
52 of statutory or common law. A health care worker who has been discriminated against pursuant
53 to this section shall be entitled to reimbursement for lost income and the legal costs associated
54 with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter
55 or other applicable provision of statutory or common law. A member of the medical staff who
56 has been discriminated against pursuant to this section shall be entitled to reinstatement,
57 reimbursement for lost income resulting from any change in the terms or conditions of his or her
58 privileges caused by the acts of the facility or the entity that owns or operates a health facility or
59 any other health facility that is owned or operated by that entity, and the legal costs associated
60 with pursuing the case, or to any remedy deemed warranted by the court pursuant to this chapter
61 or any other applicable provision of statutory or common law.

62 (1) The term “legal costs” as included in section (g) specifically includes reasonable
63 attorney’s fees and costs associated with the litigation.

64 (h) The medical staff of the health facility may petition the court for an injunction to
65 protect a peer review committee from being required to comply with evidentiary demands on a
66 pending peer review hearing from the member of the medical staff who has filed an action
67 pursuant to this section, if the evidentiary demands from the complainant would impede the peer
68 review process or endanger the health and safety of patients of the health facility during the peer
69 review process. Prior to granting an injunction, the court shall conduct an in camera review of
70 the evidence sought to be discovered to determine if a peer review hearing, as authorized in
71 Section 805 and Sections 809 to 809.5, inclusive, of the Business and Professions Code, would
72 be impeded. If it is determined that the peer review hearing will be impeded, the injunction shall
73 be granted until the peer review hearing is completed. Nothing in this section shall preclude the
74 court, on motion of its own or by a party, from issuing an injunction or other order under this
75 subdivision in the interest of justice for the duration of the peer review process to protect the
76 person from irreparable harm.

77 (i) For purposes of this section, “health facility” means any facility defined under this
78 chapter, ~~including, but not limited to, the facility’s administrative personnel, employees, boards,~~
79 ~~and committees of the board, and medical staff, and any facility licensed by the State as an~~
80 intermediate care facility, intermediate care facility for the developmentally disabled, congregate
81 living health facility, and/or pediatric day health and respite care facility, including, but not
82 limited to, the facility’s administrative personnel, employees, boards, and committees of the
83 board, and medical staff. The remedies provided in this section are not exclusive and are in
84 addition to any other remedies or procedures provided in any other law.

85 (j) This section shall not apply to an inmate of a correctional facility or juvenile facility of
86 the Department of Corrections and Rehabilitation, or to an inmate housed in a local detention
87 facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention
88 facility.

89 ~~(k) This section shall not apply to a health facility that is a long-term health care facility,~~
90 ~~as defined in Section 1418. A health facility that is a long-term health care facility shall remain~~
91 ~~subject to Section 1432.~~

92 (l) Nothing in this section shall be construed to limit the ability of the medical staff to
93 carry out its legitimate peer review activities in accordance with Sections 809 to 809.5, inclusive,
94 of the Business and Professions Code.

95 (m) Nothing in this section abrogates or limits any other theory of liability or remedy
96 otherwise available at law.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Existing law prohibits a “health facility” from discriminating or retaliating against patients, employees and other individuals for reporting patient safety violations. The current statute only provides protection to employees at 24 hour acute care facilities, and specifically excludes employees at long term care facilities, through the cross-reference definition in subdivision (i) (which ultimately leads to a definition under Health & Safety Code § 1250). Thus, workers – including nurses, pharmacy technicians, laboratory assistants, physician assistants, etc. -- at numerous healthcare facilities which provide treatment of the most serious of conditions – including chemotherapy treatment centers, outpatient surgery centers, adult care facilities, etc. – are unprotected from retaliation should they report patient safety concerns or

violations. Existing law in Health and Safety Code section 1278.5 also permits a prevailing plaintiff to recover “legal costs.” The term is poorly drafted, though its use in other statutes make clear it includes attorney’s fees, in addition to the costs typically recoverably by any prevailing party under C.C.P. § 1032.

The Solution: This resolution would expand anti-retaliation protections to healthcare workers in intermediate and congregate living health facilities to ensure that healthcare workers in all facilities providing licensed care to patients are protected from retaliation for reporting unsafe patient care or conditions. It is an important public goal to ensure the safe care of patients in any healthcare facility. If healthcare workers in non-acute care facilities do not have the highest protections from retaliation for reporting unsafe patient care or conditions, they may be extremely reticent to put their own livelihood on the line to ensure patients are not endangered. It is the responsibility of the State to protect healthcare workers who are providing the best care possible to their patients. This resolution would also clarify the meaning of the term “legal costs” so healthcare workers who are retaliated against after reporting unsafe patient care or conditions are not barred from recovering attorney fees due to a poor choice of words the part of the legislature. Under CCP § 1032, a prevailing party is already entitled to recover the “costs” or litigation. As such, the language contained in the existing version of Health and Safety Code § 1278.5 clearly intends the prevailing party to recover attorney’s fees – the “legal costs” associated with litigation. The Legislature has expressly noted that the term “legal costs” includes attorney’s fees in at least three other statutes: Government Code §§ 77204, 85304, and 85304.5. Accordingly, this definition should be made equally clear in this important legislation protecting healthcare workers as providing for recoverable attorney’s fees is a well-recognized enforcement mechanism for statutes that advance important public policies. (See *Dennis v. Chang* (9th Cir. 1980) 611 F.2d 1302.

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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